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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

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6 SECURITIES INVESTOR PROTECTION

7 CORPORATION, Case No. 08-1789(SMB)

8

9 Debtor.

10

11 - - - - - x In

12 SECURITIES INVESTOR PROTECTION

13 CORPORATION,

14 Plaintiff,

15 v. Adv. Case No. 08-01789(SMB)

16 BERNARD L. MADOFF INVESTMENT

17 SECURITIES, LLC,

18 Defendant.

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1 IRVING H. PICARD, TRUSTEE FOR

2 LIQUIDATION OF BERNARD L. MADOFF

3 INVESTMENT SECURITIES LLC,

4 Plaintiff,

5 v.

Adv. Case No. 10-04941(SMB)

6 MOST,

7 Defendant.

8 - - - - - x

9 IRVING H. PICARD, TRUSTEE FOR

10 LIQUIDATION OF BERNARD L. MADOFF

11 INVESTMENT SECURITIES LLC,

12 Plaintiff,

13 v.

Case No. 10-04947(SMB)

14 MOST,

15 Defendant.

16 - - - - - x

17 U.S. Bankruptcy Court

18 One Bowling Green

19 New York, New York

20

21 May 13, 2014

22 10:20 AM

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Page 3

1 B E F O R E :

2 HON STUART M. BERNSTEIN

3 U.S. BANKRUPTCY JUDGE

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8 Hearing re: Conference on Chaitman Letter of May 7, 2014

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10 Hearing re: Order to Show Cause Why Subpoenas Issued By
11 Plaintiff Should Not Be Quashed And Protective Order Should
12 Not Be Granted

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: Madoff?

3 (Pause)

4 THE COURT: Go ahead.

5 MS. CHAITMAN: Good morning, Your Honor, Helen
6 Davis Chaitman of Becker & Polaikoff. I'm just here on a
7 calendaring issue, Your Honor.

8 The trustee has responded to our document demand
9 with respect to those inter-account transfer claimants that
10 we've represented by filing objections and the documents are
11 over 300,000 pages of documents.

12 We had asked for an extension of time to respond,
13 the trustee had agreed to 30 days, we asked for 60 days, and
14 unfortunately we've had a delay in simply getting the
15 documents because we've had an issue about the disclosure --
16 the non-disclosure agreement, and I have a proposed order
17 that I'd like to hand up to the Court which very simply
18 deals with these documents.

19 The issue really is, Your Honor, whether documents
20 relating to individual accounts have to be filed under seal.
21 I think it creates an unfair burden on us to have to file
22 all these documents under seal, and I don't think there's
23 anything confidential about the documents that can't be
24 redacted. In other words we would certainly redact social
25 security numbers. But otherwise these are simply documents

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1 relating to either the accounts of our clients or the
2 relatives who transferred money into the accounts of our
3 clients.

4 THE COURT: Okay.

5 MS. CHAITMAN: May I approach the bench and hand
6 up this --

7 THE COURT: Well, let me hear --

8 MS. CHAITMAN: Okay.

9 THE COURT: I'm not going to read an order now
10 anyway.

11 MS. CHAITMAN: Okay.

12 MS. TRUONG: Good morning, Your Honor, Sarah Jane
13 Truong from Baker Hostetler on behalf of the trustee.

14 First I'd like to point out that Ms. Chaitman's
15 letter raises more issues than merely just a request for an
16 extension, and I'd like to be able to address the points
17 that she raises in her letter.

18 THE COURT: Go ahead.

19 MS. TRUONG: First of all the trustee maintains
20 that any discovery that Ms. Chaitman has requested on behalf
21 of the Chaitman claimants has no bearing on the legal issue
22 before Your Honor.

23 In addition, the delay that would be in place here
24 should the date be extended would impact hundreds of other
25 claimants.

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1 Moreover, any factual issues that Ms. Chaitman's
2 clients may raise are preserved for a later date and are --
3 have no bearing to the legal issue before Your Honor, which
4 is the application of the net investment method to the
5 calculation of inter-account transfers, not how that
6 calculation is actually applied to any specific claims.

7 The second issue I'd like to address is any
8 perceived delay in the discovery.

9 The trustee has gone above and beyond to
10 accommodate any discovery requests. When Ms. Chaitman
11 served her document request on April 4th we identified 102
12 unique BLMIS accounts. We had to then conduct an
13 investigation to identify any further accounts -- BLMIS
14 accounts that affect the net equity of those 102. We
15 identified 232 additional accounts. So for a total of 334
16 accounts we then had to identify the responsive documents
17 that relate to those accounts.

18 We went through and undertook in a very short
19 amount of time to identify certain categories of documents,
20 and within three weeks after Ms. Chaitman's requests were
21 served we provided her with summary sheets that basically
22 provide a road map of the different types of documents that
23 would be responsive and also identifies each document and
24 the relevant page numbers in each document for each of the
25 BLMIS accounts.

1 THE COURT: I don't understand her to be arguing
2 that you haven't -- the documents aren't available.

3 MS. TRUONG: Right.

4 THE COURT: I understand the argument she needs
5 more time to look at them and there's an issue about how
6 those documents can be used in connection with filings.

7 MS. TRUONG: Yes. So the documents were
8 originally provided to her on April 25th in an electronic
9 production with what we call E Data Room 1, it's a data room
10 that contains all the documents and she could use the road
11 maps that we provided her to view ,and also request for
12 physical copies if she wanted to, but she could search
13 through those documents, view them, review them, tag any she
14 wants a physical copy of. They're already in redacted form
15 for any personally identifiable information in this data
16 room.

17 To the extent then Ms. Chaitman did not want to
18 sign the non-disclosure agreement that governs the data room
19 we advised her that we could provide the documents to her.

20 THE COURT: Are you insisting that the account
21 records be filed under seal?

22 MS. TRUONG: No, we are not insisted at all that
23 the account records be filed under seal.

24 THE COURT: All right. So that sounds like a non-
25 issue.

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1 MS. CHAITMAN: That's correct.

2 THE COURT: Okay.

3 MS. TRUONG: Yes, we are not, we were just merely
4 stating that if she wants the documents in unredacted format
5 she would need to sign an undertaking consent to be bound by
6 the litigation protective order because those documents do
7 contain confidential material, the personally identifiable
8 information of claimants that are not represented by
9 Ms. Chaitman.

10 To the extent those documents are then used of
11 course if she does not to file them under seal then she --
12 and she does want to use them in any public filing she
13 understands and we understand she can redact them under
14 9037.

15 THE COURT: Well they're her clients, yeah.

16 MS. TRUONG: The 102 accounts relate to her
17 clients, the other 232 accounts that affect the net equity
18 of those 102 are not represented by Ms. Chaitman.

19 THE COURT: Okay, I got it. Thank you.

20 Anybody else?

21 All right. There are really two issues here. One
22 concerns the timing of the motion.

23 I don't think you were here the last time, Ms.
24 Chaitman, but we had a discussion about this and the need
25 for discovery concerning the motion, and at that time I told

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1 your colleague, look, if you can convince me that I can't
2 decide this motion as a matter of law like a motion for
3 summary judgment then I'll deny the motion and we'll move on
4 to the next phase.

5 The trustee insists I can decide it as a matter of
6 law without documents so I'm happy to try that.

7 With respect to the timing, it's not -- or the
8 discovery issue it's not clear to me what the dispute is at
9 this point. They don't have to be filed under seal. Since
10 you don't need them for the motion, you can look at them I
11 guess at a more leisurely pace, the requirement that you
12 sign a non-disclosure agreement because you're going to be
13 looking at records that are not your clients' records seems
14 to me to be a reasonable way to deal with it.

15 I also noticed in your letter about having to tag
16 documents for copying. I remember being a young lawyer and
17 going on document searches and that's what you do, you tag
18 the documents, you gave them into whoever produced them and
19 they made copying for you. So that one doesn't offend me
20 that much I have to tell you.

21 MS. CHAITMAN: It's a little bit different now,
22 Your Honor, because we're all dealing with electronic
23 documents.

24 THE COURT: I don't know, I haven't practiced in
25 20 years, so --

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1 MS. CHAITMAN: I know.

2 HE COURT: -- I'll take your word for it.

3 MS. CHAITMAN: This is the thing, Your Honor,
4 basically what happens is if we had to go to the electronic
5 data room and simply tag the documents and then get PDFs,
6 which are almost like physical copies, we wouldn't be able
7 to search them on our own computer system, and when we're
8 dealing with hundreds of thousands of pages of documents the
9 only way we can manageably deal with them is to be able to
10 put them on our computer system and search them.

11 THE COURT: Is there an objection to producing all
12 the documents as long as she signs a non-disclosure
13 statement agreement and pays for the production?

14 MS. TRUONG: I would lie to clarify one point.

15 THE COURT: Just -- I mean, you know --

16 MS. TRUONG: To the extent --

17 THE COURT: -- if she wants to pay for it.

18 MS. TRUONG: Yes. Well, I just wanted to clarify
19 one point.

20 To the extent she does tag documents for
21 production we would be giving an electronic production so
22 that could be loaded into a separate database.

23 But yes, we are amenable to providing an
24 electronic production whether -- because they are tagged in
25 the E Data Room and she signs a non-disclosure statement

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1 agreement --

2 THE COURT: Right.

3 MS. TRUONG: -- or if she signs the litigation
4 productive order and she wants a separate unredacted
5 version. We are amenable to providing it either way.

6 THE COURT: Why don't you see if you can work it
7 out. It sounds like you're on the same wave length.

8 MS. CHAITMAN: Okay. So the only issue now is
9 when our papers would be due, Your Honor.

10 THE COURT: I haven't changed the schedule.

11 MS. CHAITMAN: Okay.

12 MS. TRUONG: Thank you, Your Honor.

13 THE COURT: All right.

14 MS. CHAITMAN: Thank you.

15 THE COURT: You should have taken the 30 days
16 while you had it.

17 Next? I have a motion to quash subpoenas? Okay.
18 Who represents the movant?

19 MS. WARMUTH: I do, Your Honor.

20 THE COURT: Okay.

21 MS. WARMUTH: Paula Warmuth, Stim & Warmuth, P.C.,
22 I represent the movants, Michael Most and Marjorie Most.

23 They are defendants in a claim for fraudulent
24 transfer under 548(a)(1)(a), which is -- permits the trustee
25 to avoid any transfer of an interest of the debtor in

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1 property incurred within -- on or within two years of the
2 date of filing.

3 The first thing the trustee argues is that
4 although we admitted we received the two-year transfers --

5 THE COURT: Well you didn't, you denied it in your
6 answer.

7 MS. WARMUTH: No, we admitted it in the notice to
8 admit.

9 THE COURT: Oh, I didn't see that.

10 MS. WARMUTH: Yeah, that's -- I'll give you the --

11 THE COURT: Which exhibit is that?

12 MS. WARMUTH: -- the exhibit number.

13 (Pause)

14 MS. WARMUTH: That's Exhibit E. If you look at
15 paragraphs 1, 2, and 3.

16 THE COURT: Okay.

17 MS. WARMUTH: So we did admit it. They say that
18 refused to produce them. I don't recall that we've been
19 asked to produce the checks for Madoff to my client during
20 the two years, but in any event the trustee has produced
21 these checks, I have them right here, their Bates numbered.
22 Every check in --

23 THE COURT: Can ask you a question? I'm looking
24 at your notice to admit number 2, which are the two-year
25 transfers, why didn't you just admit it? Why do you deny it

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1 and then admit it?

2 MS. WARMUTH: Because I don't like to characterize
3 -- use their words, I want to use my words for admissions.

4 THE COURT: But you basically admitted everything
5 that they asked you to admit.

6 MS. WARMUTH: Well, I don't use their terminology.
7 I say that we got the funds that they allege in Exhibit B of
8 the amended complaint --

9 THE COURT: But you're not admitting that you were
10 an initial transferee and that's what they're interested in,
11 among other ones. You can just say you got the money.

12 MS. WARMUTH: Well there's no question that we got
13 the money from Madoff because they produced the checks and
14 we've got them right here.

15 THE COURT: Well -- okay, go --

16 MS. WARMUTH: So I mean they don't need to get
17 bank records --

18 THE COURT: Why don't you just admit --

19 MS. WARMUTH: -- for seven years --

20 THE COURT: -- why don't you just amend your
21 admissions to say I admit, I was the initial transferee and
22 all the transfers which are indicated, at least for the two-
23 year transfers?

24 MS. WARMUTH: Because they have defined terms and
25 I don't want to use their defined terms.

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1 THE COURT: But initial transferee is not a -- not
2 their term. Would you prefer immediate transferee?

3 MS. WARMUTH: No. No, I mean I understand that
4 they got the checks directly from Madoff, but --

5 THE COURT: I just think you're making this more
6 difficult than it has to be. If you admit you got the
7 transfers, the initial transfers just admit it.

8 MS. WARMUTH: But that's not the issue of the
9 subpoenas. They want seven years worth of checks --

10 THE COURT: Where'd the number seven come from? I
11 was looking through the subpoenas and it's --

12 MS. WARMUTH: Oh, if you look at the subpoena --

13 THE COURT: Because the applicable period is 17
14 years.

15 MS. WARMUTH: -- they have seven years. In the --
16 if you look at the subpoena, Exhibit F, for example -- oh,
17 I'm sorry, maybe I added wrong, 1992 to 2009.

18 THE COURT: That's 17.

19 MS. WARMUTH: I miscounted.

20 THE COURT: Yeah.

21 MS. WARMUTH: You're right.

22 THE COURT: Okay. Because we were looking all
23 over for that number and we couldn't find it.

24 MS. WARMUTH: You know you're absolutely right.

25 THE COURT: I was always good in math.

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1 MS. WARMUTH: I guess I'm not.

2 But the thing is it's only the two years that in
3 claim that are at issue.

4 THE COURT: Well but not really under the net
5 investment method. They have to go all the way back and
6 compute all of the deposits and all of the withdrawals to
7 determine what your net equity is.

8 MS. WARMUTH: And they've done that. They have
9 all those records. They've produced them in document
10 production. They have all the records going in, coming out.

11 THE COURT: Have you admitted -- well, I
12 understand they have it, have you asked her to admit -- the
13 schedules I take it in the complaint encompass all of the
14 withdrawals and deposits --

15 MS. WARMUTH: Yes, Your Honor. If you look at --

16 THE COURT: -- in the account?

17 MS. WARMUTH: -- Exhibit A --

18 THE COURT: Has she -- if she's admitted it I
19 don't know why you need the checks.

20 MR. JACOBS: Your Honor, the defendants have made
21 the admissions only with respect to two-year transfers
22 preceding the filing of the petition.

23 THE COURT: Well --

24 MR. JACOBS: But --

25 THE COURT: -- you don't -- do you have any

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1 schedules that go back to 1992? You got six-year schedules
2 and two-year schedules. As I said, do your schedules
3 include all of the transfers?

4 MS. WARMUTH: We include all of them.

5 MR. JACOBS: Yes, Your Honor.

6 THE COURT: Okay. And so she admits, yes, those
7 were all of the transfers and all of the deposits. What
8 more do you need?

9 MR. JACOBS: Well the admissions only relate to
10 transfers from BLMIS in the two-year period directly
11 proceeding the petition for filing.

12 The defendants' affirmative defenses raise issues
13 of deposits and withdraws to those accounts throughout the
14 relevant life of the accounts going back to 1992, which is
15 why we requested the financial records through that date.

16 THE COURT: I'm just trying to find out if there's
17 a dispute in terms of what went in and came out of the
18 account from day one. What's the dispute?

19 MR. JACOBS: Well, I think that the defendants
20 have raised affirmative defenses that dispute all -- that
21 raise all kinds of issues related to antecedent debt and the
22 way that the trustee calculates the deposits and withdraws
23 to those accounts.

24 So we have records for BLMIS accounts and we have
25 the customer statements; however, we don't have the

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1 defendants' bank records that would prove or disprove the
2 defenses that they're raising concerning their
3 characterization of deposits and withdraws made to and from
4 the relevant accounts.

5 THE COURT: I'm not sure I understand that. But
6 if they admit that this is everything that went in and out
7 of the account I don't -- I don't know what more information
8 -- what information you need at least in your direct case.
9 Do you need anymore in your direct case?

10 MR. JACOBS: Not with respect to our allegations
11 concerning the two-year transfers.

12 THE COURT: Okay. So then the question is the
13 affirmative defenses.

14 MR. JACOBS: Right.

15 THE COURT: And you raise two issues in your
16 letter -- three I guess. One was the antecedent debt
17 defense.

18 MR. JACOBS: Correct.

19 THE COURT: And one was this kind of equitable
20 defense that was raised.

21 MR. JACOBS: Right.

22 THE COURT: And the third was subsequent
23 transfers.

24 MR. JACOBS: Correct.

25 THE COURT: Okay.

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1 MR. JACOBS: So the --

2 THE COURT: And the subsequent transfers would
3 only be relevant to the two-year transfers because those are
4 the only transfers you can avoid right now.

5 MR. JACOBS: That's correct, but that information
6 concerning how the transfers might have been disbursed by
7 the defendants is uniquely in the defendants' financial
8 records. We don't have --

9 THE COURT: But only for the two-year -- if it's
10 just limited to the two-year transfers it's just -- you just
11 reach back two years.

12 MR. JACOBS: Correct, but Your Honor, we don't
13 have the defendants' financial records for those two years.

14 HE COURT: That I understood.

15 MR. JACOBS: Yes.

16 HE COURT: All right. Now one of the issues that
17 was raised in the trustee's response is you haven't met and
18 conferred. And I realize the time is tight on this. Are
19 you insisting that the subpoenas be complied with on the
20 16th?

21 MR. JACOBS: Well no, Your Honor, we have made
22 several offers to meet and confer even after these motions
23 were filed and the defendants have ignored our request.

24 MS. WARMUTH: I disagree with that. I'm still
25 waiting for --

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1 THE COURT: Are you prepared to meet? Are you
2 prepared to meet and confer?

3 MS. WARMUTH: I'm just concerned the 16th is on
4 Friday.

5 THE COURT: He's -- I understand, but he says that
6 he's not going to insist on compliance with the subpoena on
7 the 16th, then you'll meet and confer and another court
8 conference.

9 MR. JACOBS: Right, and the only caveat to that,
10 Your Honor, is the fact discovery in this case closes on
11 May 30, so to the extent the defendants are attempting to
12 delay discovery on relevant issues --

13 THE COURT: Any objection to extending discovery so
14 that we can --

15 MS. WARMUTH: No, I --

16 THE COURT: -- if possible resolve this?

17 MS. WARMUTH: -- there's a lot of discovery I
18 didn't get. A lot of discovery I didn't get from the
19 trustee also.

20 THE COURT: What discovery do you need?

21 MS. WARMUTH: I have various demands I've made
22 that they haven't complied with, I've written them a good
23 faith letter, I'm waiting for them to respond. They haven't
24 responded.

25 THE COURT: All right. You can deal with that in

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1 the meet and confer also.

2 MS. WARMUTH: I'm not bringing that up now, but
3 Your Honor, as far as the subsequent transferees the statute
4 says, "The trustee may not recover under this section from
5 an immediate or immediate good faith transferee of such
6 transferee," and the trustee has admitted that the
7 subsequent transferee is a good faith --

8 THE COURT: But provided you paid value and took
9 without knowledge the avoidability of the transfer.

10 MS. WARMUTH: Well it doesn't say that in the
11 statute.

12 THE COURT: That's what it says in 550(b)(2).

13 MS. WARMUTH: You're saying --

14 THE COURT: The subsequent transferee has
15 additional defenses once you get past the good faith of the
16 initial transferee, but the subsequent transferee has an
17 affirmative defense that the defendant has to plead and
18 prove, which is that they took in good faith for value and
19 without knowledge of avoidability of the transfer, right?

20 MS. WARMUTH: For a transferee, yes.

21 THE COURT: He's not -- he's not -- yeah.

22 MS. WARMUTH: That's subdivision 1.

23 THE COURT: Right.

24 MS. WARMUTH: Subdivision 2 as, "Or you cannot
25 recover from any immediate or immediate good faith

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1 transferee." It doesn't have for value without knowledge in
2 that subdivision.

3 THE COURT: The initial transferee -- the good
4 faith of the initial transferee is covered by 548(c) --

5 MS. WARMUTH: I was looking --

6 THE COURT: -- and that goes to reduce the amount
7 of the transfer. Once -- the avoidable transfer. Once the
8 transfer is avoided then you look to 550 for the recovery.
9 Under 550 you can recover everything that's avoidable from
10 the initial transferee and then the subsequent transferee
11 has additional defenses.

12 There's a second good faith hurdle, but it's not
13 enough to show -- for the subsequent transferee to show that
14 it took in good faith, it also has to show that a value and
15 took without knowledge of avoidability of the transfer.

16 The 82 is referring to subsequent transferees and
17 then (b) there's a limitation on the ability to recover from
18 subsequent transferees.

19 MS. WARMUTH: Correct.

20 THE COURT: The bottom line is for a subsequent
21 transferee they have to prove more than they took in good
22 faith, and the trustee is not necessarily contesting that
23 subsequent transferee took in bad faith, although I suppose
24 you never know who they transferred to.

25 MS. WARMUTH: Well they would consent -- they've

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1 admitted that they took in good faith.

2 THE COURT: The initial transfer was in good
3 faith.

4 MS. WARMUTH: And the subsequent transferee. It's
5 right in the papers that were submitted to the Court.

6 THE COURT: Okay.

7 MS. WARMUTH: It said, "The trustee does not
8 challenge the good faith of the initial or subsequent
9 transferees."

10 THE COURT: Okay. But he hasn't admitted that
11 they took the value or they took it without knowledge of
12 avoidability of the transfer.

13 MS. WARMUTH: No.

14 THE COURT: So there's still an -- all I'm saying
15 is there's still an issue with subsequent transferees, but
16 what I would do is meet and confer, I'll suspend the date to
17 comply with the subpoenas pending the meet and confer and
18 another court conference.

19 MS. WARMUTH: Your Honor, may I -- may I notify
20 the banks --

21 THE COURT: Well I'll have -- since they served a
22 subpoena you notify them, okay?

23 MR. JACOBS: Okay.

24 THE COURT: You're notifying them, not --

25 MS. WARMUTH: I'm just worried they're going sent

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1 the papers early.

2 THE COURT: My experience with banks is they'll
3 probably send it six months from now if they send it at the
4 all, but I understand your concern, but I'll direct the --
5 Mr. Picard's counsel to notify the banks not to comply with
6 all further notice.

7 MS. WARMUTH: Thank you.

8 THE COURT: Let me just give you a date to come
9 back.

10 (Pause)

11 THE COURT: You can come back May 28th or
12 May 29th, what's your pleasure?

13 MS. WARMUTH: Your Honor, may I get my calendar?

14 THE COURT: Sure. But in the interim you should
15 meet and confer.

16 (Pause)

17 MR. JACOBS: Your Honor, I just want to note for
18 the record that we have already instructed the banks not to
19 comply with are subpoenas until further notice given --

20 THE COURT: Boy you're fast, I didn't even see you
21 leave the room.

22 MR. JACOBS: I'm sorry?

23 THE COURT: Never mind.

24 (Laughter)

25 MR. JACOBS: That happened prior to today.

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1 THE COURT: Okay.

2 MS. WARMUTH: Your Honor, I cannot find my
3 calendar, but I am going to be out of the --

4 THE COURT: All right, why don't you -- why don't
5 you do this. I'll put you down for the 28th, If that's not
6 convenient just let me know and we'll put it on to the 29th,
7 okay? Take your time.

8 MS. WARMUTH: May -- I found it.

9 THE COURT: Oh, good.

10 MS. WARMUTH: Okay. May 28th is fine.

11 THE COURT: Okay. May 28th. I'll ask you to
12 write me a letter just before then to let me know what's
13 still out -- you know, what issues are still outstanding,
14 okay? 10 o'clock, see you on May 28th. Enjoy the holiday.

15 MS. WARMUTH: Thank you, Your Honor.

16 THE COURT: Okay, thank you.

17 (Whereupon these proceedings were concluded at 10:33
18 AM)

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C E R T I F I C A T I O N

2

3 I, Dawn South, certify that the foregoing transcript is a
4 true and accurate record of the proceedings.

5

6 **Dawn South**


Digitally signed by Dawn South
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8 AAERT Certified Electronic Transcriber CET**D-408

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15 Date: May 14, 2014

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